No. [illegible]

In the

United States Court of Appeals

For the Ninth Circuit

[illegible], Appellant,	
vs.	
[illegible], Appellee.	

Brief of Appellee

FILED

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Attorneys for Appellee.

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No. 22764

In the

United States Court of Appeals

For the Ninth Circuit

FRANK A. EYMAN, Warden, Arizona State Prison,

Respondent-Appellant,

vs.

JOSEPH ALVIN SCHANTZ,

Petitioner-Appellee.

Brief of Appellee

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States Amendment V:

"No person shall . . . be compelled in any criminal case to be a witness against himself . . ."

Constitution of the United States Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense."

Constitution of the United States Amendment XIV:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

ISSUES PRESENTED FOR REVIEW

As discussed in Sec. II of the argument, the precise constitutional issues raised by the Appellant in this case were not presented below, and thus were not preserved. As now presented to this Court, the issues are as follows:

1. Does the admission of evidence showing that an accused has refused to submit to psychiatric examination requested by the State, and comment upon that evidence by the prosecutor, violate an accused's right to due process of law, where there was no authority for the examination, the request was made without any notice to the accused or his counsel, and counsel was not present?

2. Does the admission of this evidence, and the comment thereon violate an accused's privilege against self-incrimination?

3. Does the admission of this evidence, and the comment thereon violate an accused's right to assistance of counsel?

Subsidiary issues are whether the trial court should have held a hearing to determine the admissibility of this evidence, and whether the admission, if error, was harmless.

STATEMENT OF THE CASE

A. Proceedings Below.

This proceeding arose as a Writ of Habeas Corpus filed by the appellee, Joseph Alvin Schantz, in the Federal District Court for the District of Arizona on November 7, 1967. Mr. Schantz was at that time imprisoned at the Arizona State Prison, Florence, Arizona, by the respondent, Frank Eyman, Warden of the Arizona State Prison, pursuant to a judgment of the Superior Court of Arizona, Maricopa County, entered on January 28, 1963, wherein Mr. Schantz was adjudged guilty of murder in the second degree. That judgment was affirmed on appeal by the Supreme Court of

Arizona on June 23, 1965. 98 Ariz. 390, 403 P.2d 521 (1965). Certiorari was denied by the United States Supreme Court on January 24, 1966. 382 U.S. 1015, 86 S. Ct. 628 (1966). Meanwhile, on July 13, 1965, Mr. Schantz had filed a motion for new trial based upon newly discovered evidence. That motion was denied on March 31, 1966. The denial of that motion was affirmed by the Supreme Court of Arizona on May 11, 1967. 102 Ariz. 212, 427 P.2d 530 (1967). Throughout these proceedings Mr. Schantz was at liberty, on bond. He was thereafter imprisoned pursuant to a sentence of not less than fifteen nor more than sixteen years imposed by the Superior Court of Arizona, Maricopa County, in Cause Number 40470. His petition for a Writ of Habeas Corpus was granted on January 28, 1968 by United States District Judge William P. Copple and this appeal followed.

B. Jurisdiction.

The District Court had jurisdiction to grant the Writ of Habeas Corpus under 28 U.S.C. Sec. 2241 (c) (3). The petition was granted on January 28, 1968. Notice of appeal was filed February 2, 1968 by the appellant, Frank A. Eyman. This court has appellate jurisdiction pursuant to 28 U.S.C. Sec. 2253.

C. Facts.

After the hearing below, the District Court accepted as accurate the following uncontested factual allegations of the petitioner:

> "Before trial, the County Attorney of Maricopa County had made a motion in Maricopa County Superior Court seeking an order allowing two State's psychiatrists to examine the petitioner. On the day set for hearing this motion the County Attorney withdrew it. The same day the County Attorney sent Dr. Paul

Bindelglas, a psychiatrist, to the petitioner's home, unannounced, and without notice to either the petitioner or his counsel.

"At trial Dr. Maier Tuchler, a psychiatrist, was called by the petitioner. He testified that he had examined the petitioner on numerous occasions following the offense, and gave as his opinion that the petitioner, at the time of the offense, did not know the nature and significance of his acts and did not know right from wrong. He further testified that the petitioner had total amnesia respecting the events related to the homicide, and that his efforts to bring back the petitioner's memory were unsuccessful; that an amnesia state exists where the emotional state predominates without the conscious awareness of the individual; and that acts in such a state are outside the person's deliberate, volitional conscious awareness.

"In rebuttal of this expert testimony elicited by the petitioner, the State offered no testimony concerning insanity or mental condition. Instead, the County Attorney called Dr. Bindelglas to the stand, qualified him as an expert in psychiatry, and had him testify, over the strenuous objection of the petitioner, as follows:

"Q. By [Prosecuting Attorney]: You went for the purpose of performing a psychiatric examination?

"A. Yes.

"Q. Did you ask him to take a psychiatric examination?

"A. Yes.

"Q. And did you tell him you were from the County Attorney's office?

"A. Yes, I did.

"Q. And did he agree to a psychiatric examination?

"A. He did not." (*See* 98 Ariz. at 213)

"There was no question that Dr. Bindelglas was a total stranger to the petitioner, and that no notice

whatsoever of this proposed examination was given to either petitioner or his counsel.

"In summation, the County Attorney argued:

"Now, ladies and gentlemen, there is a saying that a person who seeks justice in a court of law, should come in with clean hands, and I submit to you, ladies and gentlemen, that if this was a bona fide, good faith defense of insanity, why didn't he permit our psychiatrists to examine him?

"He said he was from the County Attorney's office. He said he was a psychiatrist. He asked to examine him.

"If this is a good faith defense, and this man has nothing to hide, why didn't he let our psychiatrist examine him?

"His refusal to let our man examine him shows bad faith. We would have liked to have him examined . . ."

"Ladies and gentlemen, I submit to you that this is not a good faith defense of insanity."

"On appeal to the Supreme Court of Arizona, Dr. Bindelglas' testimony was held to have been properly admitted. *State v. Schantz*, 98 Ariz. 200, 403 P.2d 521 (1965)." (Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus, pp. 2-3)

SUMMARY OF ARGUMENT

Under the circumstances of this case, as set forth in the Statement of Facts adopted by the Court below, it was fundamentally unfair to allow the prosecutor to introduce evidence of the petitioner's refusal to submit to psychiatric examination, and to argue to the jury that this evidence demonstrated that the petitioner's defense of insanity was made in bad faith. The admission of this evidence, and the comments thereon, allowed the prosecutor to take advan-

tage of a situation calculated to produce the refusal, because of the lack of notice, the lack of counsel, and the complexity of the legal issues raised by this deceptively simple request. At best, the inference argued by the prosecutor was weak, and no more compelling than a great number of other inferences to be drawn from the evidence. In a capital case, such as this, it was incumbent upon the Court and prosecutor to exercise extreme care to assure that the defendant was treated fairly both before and during trial. The actions of the prosecutor in obtaining this evidence, his use of the evidence at the trial, and his argument thereon was unfair. It was calculated to mislead the jury, and to prejudice it against the insanity defense, though the prosecutor had no competent evidence upon which to base that argument. This entire procedure was violative of the petitioner's right to due process of law guaranteed by the fourteenth amendment.

In addition to being fundamentally unfair, this procedure violated the fifth amendment by requiring the petitioner to either give potentially incriminating evidence or to suffer a penalty for refusing to do so. Anything he said to the psychiatrist could have been used against him, both as to sanity and as to guilt. In this regard the psychiatrist was no different than any other investigator employed by the State to gather evidence to convict the defendant. Certainly he was looked at no differently by the defendant. Thus, the defendant had a constitutional right to refuse the requested examination; and the introduction into evidence of his refusal, and comment thereon by the prosecutor penalized him for asserting that right. Such a penalty violates the privilege against self-incrimination. In fact, such a penalty violates the privilege against self-incrimination whether or not the defendant had a *constitutional* right to refuse, so long as he had the right to refuse, whatever its origin.

Because the confrontation between Dr. Bindelglas and Mr. Schantz came without notice, and because the decision of whether to submit to examination then, later, or ever, involved extremely complex legal issues, Mr. Schantz was entitled to have counsel present to advise him concerning all of his rights and privileges and the probable consequences of his decision. No doubt counsel's presence at such a confrontation would also have made the defendant's right to cross-examine Dr. Bindelglas much more meaningful. It is difficult to conceive a situation where the advice of counsel is more desperately needed; and to allow evidence of a defendant's refusal in the absence of counsel is clearly violative of the sixth amendment.

The admission of this evidence was error. It was constitutional error. As such, it requires that the petitioner be granted a new trial unless the State can show beyond a reasonable doubt that the error was harmless—that it did not contribute to his conviction. This the State has not done, and cannot do.

ARGUMENT

I. Jurisdiction.

In his petition for a Writ of Habeas Corpus Mr. Schantz alleged jurisdiction under 28 U.S.C. Sec. 2241 (*c*) (3). This jurisdictional allegation was not and is not contested by the State (see Return and Response to Petition for Writ of Habeas Corpus). The District Court, however, considered this issue at length and ruled that it did have jurisdiction to grant the writ. (See District Court's Opinion and Order, pages 3 and 4). Unquestionably, the District Court had jurisdiction under 28 U.S.C. Sec. 2241 (*c*) (3). *Daugharty v. Gladden*, 257 F.2d 750 (9th Cir. 1958). However, should this court determine it necessary, further authority will be presented by the petitioner.

II. The State's Failure to Present Argument Below.

At the outset it should be noted that none of the arguments or theories for reversal contained in the State's opening brief were presented to the District Court either by responsive pleading or at the time of the oral argument (see Response to Petition for Writ of Habeas Corpus; Opinion and Order of the District Court, page 4).

The petitioner contended below that the introduction of evidence pertaining to Mr. Schantz' refusal to undergo a psychiatric examination, and the prosecutor's comments upon that evidence constituted a denial of his privilege against self-incrimination under the fifth amendment to the Constitution of the United States, a denial of his right to assistance of counsel under the sixth amendment to the Constitution of the United States and a denial of his right to due process of law under the fourteenth amendment to the Constitution of the United States. The State took the position throughout the proceedings below that the question concerning the admissibility of the psychiatrist's testimony (hereafter "the Bindelglas testimony") was "one of *relevancy* and not a violation of the Fifth, Sixth and Fourteenth Amendments." (Response to Petition for Writ of Habeas Corpus, page 3). Thus, the State argued that, because the testimony was relevant, it mattered not that its introduction might have violated Mr. Schantz' constitutional rights. No cases were cited to the District Court by the State, nor did the court have the benefit of any of the arguments and theories contained in the State's brief before this Court.

Now, for the first time in this litigation, the State offers a completely new argument, and abandons its earlier position. It now contends that the Bindelglas testimony was properly admitted and that the District Court erred in

granting the writ of habeas corpus for the following reasons:

1. There was no compulsion upon Mr. Schantz to speak to Dr. Bindelglas;
2. The evidence sought by Dr. Bindelglas was not testimonial in nature;
3. The evidence sought by Dr. Bindelglas was not incriminating in nature;
4. The privilege against self-incrimination does not apply where a defendant's sanity has been placed in issue;
5. The confrontation between Dr. Bindelglas and Mr. Schantz was not at a "critical stage" of the proceedings;
6. The prosecutor's comments upon the Bindelglas testimony was not error because it applied to the sanity issue rather than the guilt issue; and
7. If it was error to admit the Bindelglas testimony and to comment thereon, that error was "harmless."

In presenting this new argument the State ignores the well settled rule of appellate procedure that there can be error only with respect to matters presented to the trial court, and limited to the contentions made to it as the basis for requested action. *Indiviglio v. United States*, 249 F.2d 549 (5th Cir. 1957). In *Indiviglio v. United States*, *supra*, the court stated the rule as follows:

> "'The general rule . . . is that an appellate court will consider only such questions as were raised and reserved in the lower court.' 'It is well settled that the theory upon which the case was tried in the court below must be strictly adhered to on appeal or review. Under this rule a party will not be permitted, in the appellate or reviewing court, to assume a position in-

consistent wtih that occupied by him in the trial court with respect to the grounds or theory of recovery or relief or of defense or opposition, the nature or sufficiency of pleadings, the admissibility or sufficiency of evidence, or the burden of proof.'

"'The general rule that an appellate court will consider only such questions as were raised in the lower court, and the rule requiring adherence to the theory pursued below, operate ordinarily to preclude the consideration, on appeal or review, of grounds of defense or of opposition not asserted and relied on in the trial court.'" 249 F.2d at 560.

Having failed to present to the district court any of the arguments or theories now urged, the State should be precluded from presenting them for the first time on appeal. For that reason, though these matters will be considered below, the case should be decided on the basis of the pleadings and arguments presented to the district court.

III. The Introduction of the Bindelglas Testimony and the Prosecutor's Comments Thereon Violated Mr. Schantz' Right to Due Process of Law.

A. SCOPE OF THE CONSTITUTIONAL QUESTION.

The petitioner has not urged, and does not urge herein, that a state cannot, consistent with the due process clause of the Constitution of the United States, require a criminal defendant to submit to a psychiatric examination in a case where the defendant's sanity has been placed in issue. The question is not raised here. Rather, the question is whether, under the circumstances of the confrontation between Dr. Bindelglas and Mr. Schantz, and in the absence of a court order or any other authority for a psychiatric examination, it was fundamentally unfair to allow evidence of Mr. Schantz' refusal to be examined, and to allow comment upon that evidence by the prosecutor.

B. THE LAW.

The due process clause of the fourteenth amendment to the Constitution of the United States requires more than notice and hearing. *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935). The due process clause "embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney v. Holohan, supra*, 294 U.S. at 112, 55 S. Ct. at 342. The scope of due process has been variously defined by the Supreme Court, but, generally, it embodies the concept of "fair play." *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948); *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); *Dennis v. Dees*, 278 F. Supp. 354 (E.D. La. 1968). As stated in *Irvin v. Dowd, supra*, the due process clause requires "a fair trial in a fair tribunal." And in *In re Oliver, supra*, the requirement was stated:

> "It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal." 333 U.S. at 278, 68 S. Ct. at 510.

The requirement was perhaps best stated in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), when the court stated ". . . our system of administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87, 83 S. Ct. at 1197.

This requirement has been applied in a number of varying situations. In *Miller v. Pate*, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967), the Supreme Court condemned as unfair the actions of a Prosecuting Attorney who led a jury to believe that stains on clothing were blood, when he knew that at least some of the stains has been caused by paint. The court held that the fourteenth amendment

protects the criminal defendant from such unfair prosecution tactics.

Brady v. Maryland, supra, and *Ashley v. Texas,* 319 F.2d 80 (5th Cir. 1963), hold that the suppression of relevant evidence which would be favorable to the defendant violates the due process requirement of fairness irrespective of the prosecutor's intent in withholding the information.

In *Dennis v. Dees, supra,* the court held that it was unfair, and thus a violation of the fourteenth amendment, to require a defendant to wear prison garb during his trial. See also *Giles v. Maryland,* 386 U.S. 66, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967) and *Williamson v. United States,* 311 F.2d 441 (5th Cir. 1962).

C. THE CIRCUMSTANCES OF THE REFUSAL.

It is undisputed that Dr. Bindelglas was unknown to Mr. Schantz. Though he was hired by the County Attorney's Office, and was no doubt an agent of the County Attorney's Office at the time of the confrontation, there was no court order or other authority for him to conduct the examination, nor any which required Mr. Schantz to submit to it. No one told Mr. Schantz that Dr. Bindelglas was coming nor that he would be required to submit to an examination. Though the prosecutor was well aware that Mr. Schantz was represented by counsel, that counsel was not informed of Dr. Bindelglas' impending visit.

Mr. Schantz refused to talk to Dr. Bindelglas. The record does not reflect why he refused to talk to him. He may have refused, as do many people, to talk to anyone whom he did not know. He may have been told not to talk to anyone about the case, or he may have felt that his attorney would not want him to talk to anyone about the case. He may have felt that, if an examination was to occur, it should be con-

ducted under proper circumstances and not at his home without prior notice to either him or his counsel.

Nothing in the record reflects that Mr. Schantz was informed of any of his rights or duties concerning the proposed psychiatric examination, either by Dr. Bindelglas, by representatives of the state, or by his own counsel. Instead he was caught alone, without proper advice and under unusual circumstances to decide correctly all of the legal ramifications of his act—a decision to which the State now devotes 48 pages of brief. Mr. Schantz chose the only method then available to him to protect his rights—the only method reasonably to be expected—he chose to remain silent.

There is little doubt that the prosecutor expected him to remain silent—to refuse to be examined. The prosecutor sent Dr. Bindelglas to Mr. Schantz' home under circumstances which were calculated, not to obtain a psychiatric examination, but to obtain what was in fact obtained, an unconsidered and unadvised refusal by Mr. Schantz. To allow the state to use this evidence—clearly expected, and procured through the act of the prosecutor—violates the fundamental fairness requirement of the fourteenth amendment's due process of law provision.

Perhaps the case most nearly parallel to the one at bar is *Hamrick v. Baily*, 386 F.2d 390 (4th Cir. 1967). In that case the Fourth Circuit Court of Appeals held that the prosecution's use of evidence which was misleading, though true, violated the principles of the fourteenth amendment requiring fair play. The same issue is squarely before this Court. In this case the prosecutor put before the jury evidence of Mr. Schantz' refusal to submit to the requested examination, and argued that this evidence showed that his defense of insanity was made in bad faith. This evidence was clearly misleading. The jury could only speculate as to Mr. Schantz' reason for refusing; and the conclusion that

his defense was made in bad faith was certainly no more called for than any other conclusion. In addition, it was wholly unfair to argue that his refusal was predicated upon a fear that he would be found sane if examined, when the prosecutor had timed the request so that he would certainly refuse. It is difficult to conceive a more unfair tactic or one which was more likely to mislead the jury.

The State has admitted that the probative value of this evidence was very slight. (See Appellant's Opening Brief, pp. 30 and 43). It is, thus, all the more clear that the introduction of this evidence and the prosecution's argument based thereon was unfair. The use of this admittedly weak evidence, procured by the deliberate act of the prosecutor, as a basis for arguing that the defense of insanity was not made in good faith, clearly violated Mr. Schantz' right to a fair trial in a fair tribunal guaranteed by the fourteenth amendment to the Constitution of the United States, and requires a new trial.

IV. The Introduction of the Bindelglas Testimony and the Prosecutor's Comments Thereon Violated Mr. Schantz' Privilege Against Self-incrimination.

A. SCOPE OF THE CONSTITUTIONAL QUESTION.

The question before this Court is whether Mr. Schantz' privilege against self-incrimination was violated by the admission of testimony and comment thereon which was the product of Dr. Bindelglas' unannounced confrontation with Mr. Schantz while he was alone at his home. It must be stressed that the following issues are not before this Court: whether an accused can be forced to submit to a court ordered psychiatric examination; whether the accused has a right to counsel during a psychiatric examination which has been ordered by a court; and whether a prosecutor has a right to comment on a defendant's refusal to obey a court

order requiring some type of examination or nontestimonial act.

The principles to be applied to this case must be focused on a defendant's rights at the time a *request* for a psychiatric examination is made rather than at the time an actual examination is performed. The State never had any authority to require Mr. Schantz to submit to an examination. No examination was ever given. The presence or absence of rights incident to such an examination are hard questions which may well come before a future court. They are not at issue in this case.

B. THE EVIDENCE.

1. The general law.

The fifth amendment has long been recognized as protecting citizens from two distinct governmental abuses. States may not place a defendant in a position where he has no alternative but to give the state testimonial evidence which may be used against him. *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).

> "The privilege against self-incrimination, safeguarding a complex of significant values, represents a broad exception to governmental power to compel the testimony of the citizenry. The privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, *investigatory* or adjudicatory. . . . (citations omitted) and it protects any disclosure which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used." *Murphy v. Waterfront Comm'r*, 378 U.S. 52, 94, 84 S. Ct. 1594, 1611, 12 L. Ed. 2d at 678 (1964) (White concurring) (Emphasis added).

To make this privilege meaningful, the court has read an additional or corollary protection into the content of the fifth amendment. That is that a person cannot be penalized in court for invoking its protection. See, *e.g., Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). *Cf., Konigsberg v. State Bar,* 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810 (1957):

> "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann,* a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Slochower v. Bd. of Educ.,* 350 U.S. 551, 557-58, 76 S. Ct. 637, 641, 100 L. Ed. 692 (1956).

This corollary rule protects a defendant from being penalized in court in any way for invoking the protection of the fifth amendment. Any action by the prosecution which "cuts down on the privilege by making its assertion costly" is unconstitutional, *Griffin v. California, supra,* 380 U.S. at 614, 85 S. Ct. at 1233. And in determining whether any penalty is to be allowed, a court must be certain that the defendant could not possibly be exercising his fifth amendment rights before it permits the prosecutor to penalize him in any way for his actions. In *Hoffman v. United States,* 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 946 (1951), the Court, in dealing with a refusal to answer in-court questions, held that it must be "*perfectly clear* from a careful consideration of all the circumstances in the case, . . . that the answers *cannot possibly* have such tendency to incriminate." *Hoffman v. United States, supra,* 341 U.S. at 488, 71 S. Ct. at 819.

There is no reason why the burden should be any different for out-of-court confrontations. The possibilities for abuse are much greater and the protections immediately available to the defendant are much more limited. The only thing he can safely do is refuse to cooperate with the investigators until he learns what alternatives are available to him.

Under *any* standard of proof Joseph Schantz' rights against self-incrimination were violated by the evidence and comment on his refusal to allow Dr. Bindelglas to examine him. The only way he could protect himself was to refuse the examination. By allowing evidence of that refusal and comment on it, the court made Mr. Schantz' assertion of his rights "costly" in violation of the Constitution of the United States.

2. Application to the Bindelglas testimony.

a. Mr. Schantz' refusal was the product of compulsion under the circumstances which faced him.

The State argues that the fifth amendment doesn't apply to this case because "there was no compulsion." Appellant's Opening Brief at 8. Whether or not Mr. Schantz' refusal was the product of compulsion has nothing to do with whether or not the State used his refusal in a manner so as to penalize him for exercising his privilege against self-incrimination. However, the appellant's refusal in this case *was* the product of compusion because he was faced with an impossible choice. Under the State's theory of this case it could not lose. If Mr. Schantz submitted, the State might have obtained testimonial evidence which could be used to secure his conviction (see *infra*). If he refused to submit, it could use that refusal against him.

b. Mr. Schantz was protecting his privilege against self-incrimination in refusing the examination.

At the time Mr. Schantz was confronted by the State psychiatrist, the test in Arizona for the admissibility of confessions or incriminatory statements was "voluntariness." *State v. Izzo,* 94 Ariz. 226, 383 P.2d 116 (1963). Had Mr. Schantz not refused the examination, any statements he made to Dr. Bindelglas would have been admissible against him, not only on the issue of insanity, but also on the twin issues of whether or not he committed the act in question, and what his intent was at that time. *See generally* 2 Underhill, *Criminal Evidence,* Sec. 281, 286 (5th ed. 1956).

In *State v. Johnson,* 69 Ariz. 203, 211 P.2d 469 (1949), the Arizona Supreme Court allowed a newspaper reporter to testify about a confession, voluntarily made in his presence, which contained statements relative both to whether the defendant committed a murder, and to what his intent was at the time. See also *State v. Romo,* 66 Ariz. 174, 185 P.2d 757 (1947), and *State v. Weis,* 92 Ariz. 254, 375 P.2d 735 (1962) (both allowing testimony of state agents as to inculpatory admissions as well as confessions made voluntarily to them). At least two jurisdictions allow psychiatrists to reveal voluntary incriminating statements made by defendants during interviews even when conducted under court order. *Hall v. State,* 210 Ark. 180, 189 S.W.2d 917, 921-22 (1945). *People v. Ditson,* 57 Cal. 2d 415, 369 P.2d 714, 20 Cal. Rptr. 165 (1962), *People v. Combes,* 50 Cal. 2d 135, 363 P.2d 4, 14 Cal. Rptr. 4 (1961). In each of the cases cited above the jury was allowed to consider the statements not only for the purpose of determining sanity, but also for adjudging the guilt of the defendant.

The State contends that there is no privilege in most of the states to refuse to submit to a mental examination. Ap-

pellant's Opening Brief at 19. Disregarding for the moment the crucial distinction that all those cases involved a court ordered examination, exactly such a privilege does exist in Arizona. *Steward v. Superior Court*, 94 Ariz. 279, 283 P.2d 191 (1963). On the very day the State psychiatrist appeared at Mr. Schantz' door, the County Attorney withdrew a motion requesting the Court to allow two state appointed psychiatrists to examine him.

The State implies that the only way Mr. Schantz could obtain the protection of the privilege was to agree to the general inquiry as to an examination and then refuse to give incriminating answers. In the first place such a procedure is not the law, even when the examination is court ordered. *French v. District Court*, 153 Colo. 10, 384 P.2d 268 (1963), *People v. Combes*, *supra*, quoting with approval *People v. Strong*, 114 Cal. App. 522, 300 P. 84 (1931).*

Even if this were the law, to argue that a defendant, suddenly confronted with a request for an examination outside of the presence of his attorneys, should be able to draw such fine distinctions in order to protect his rights is devoid of legal reality. The test in such a situation is whether the defendant could *reasonably apprehend* that a failure to assert his privilege might allow the state to obtain or discover evidence which could be used against him. See *Application of Gault*, 387 U.S. 1, 47-48, 87 S. Ct. 1428, 1454, 18 L. Ed. 2d 527 (1967). The basic tool of a psychiatrist examination for the determination of temporary insanity is, of necessity, a personal interview. See *Rollerson v. United States*, 343 F.2d 269, 274 (D.C. Cir. 1964), Danforth, *Death-*

*"[N]othing in the section compels him to submit to the examination. If he does so the action is purely voluntary, to assert his constitutional rights all that is required is for him to stand mute, and possibly, also, to refuse to permit the examination, when the appointed expert undertakes to proceed. . . ." 114 Cal. App. at 530, 300 P. at 86.

knell for Pre-trial Mental Examination? Privilege Against Self-incrimination, 19 Rutgers L. Rev. 489, 495 (1965), and the authorities cited therein. When the psychiatrist identified himself as an agent of the State and asked Mr. Schantz to submit to a psychiatric examination, Schantz could only understand that the State wanted him to undergo some kind of interview. To hold that he has no constitutional right to refuse under these circumstances would undercut the protection the fifth amendment was intended to provide.

c. Schmerber does not apply to this case.

The State attempts to place this case under *Schmerber v. California,* 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), and other cases holding that an examination of a defendant's person does not violate his rights under the fifth amendment. However subject to dispute such a proposition might be, it has nothing to do with this case. The defendant was not examined; he was asked if he would submit to an examination. His testimonial refusal was entered in evidence against him. The results of a test on his person were not used in any way. What the State used was his refusal to submit to an interrogation by a psychiatrist working for the State. No court had ordered him to talk to the psychiatrist, and it is undisputed that he had a perfect right not to talk to him, just as he had a right not to talk to any other state investigator. In *Schmerber* the Court clearly defined the distinction.

> "The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that the source of 'real or physical evidence' does not violate it." *Schmerber v. California,* 384 U.S. at 764, 86 S. Ct. at 1832.

The Court held:

> "Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privileged grounds." 384 U.S. at 765, 86 S. Ct. at 1833.

Because Mr. Schantz's refusal *was* "petitioner's testimony" and *was* "evidence relating to some communicative act" the cases cited by the State as well as *United States v. Albright*, 388 F.2d 719 (4th Cir. 1968), holding that the fifth amendment does not protect a defendant from a *court ordered* mental examination designed to reveal noncommunicative testimony about the structure of the defendant's mind, do not apply. The evidence and comments which spawned this appeal do not go to the structure or "appearance" of Mr. Schantz's mind. They go straight to a communication made by Mr. Schantz in the exercise of his constitutional rights.

C. ADMISSIBILITY OF EVIDENCE OF REFUSAL.

1. Where there is a constitutional right to refuse.

Malloy v. Hogan, *supra*, held that the privilege against self-incrimination was one of the fundamental rights guaranteed to all persons under the constitution, it also held that the privilege includes (1) both the right to choose to remain silent, and (2) the right to "suffer no penalty" for that silence. *Malloy v. Hogan*, *supra*, 378 U.S. at 8, 84 S. Ct. at 1493. *Griffin v. California*, *supra*, applied the second phase of the privilege against self-incrimination holding that comment, by judge or prosecutor, upon the defendant's failure to testify violated the privilege. There, the court used broad language which made it crystal clear that any

penalty imposed by courts for exercising a constitutional privilege is unconstitutional, because "it cuts down on the privilege by making its assertion costly." *Griffin v. California, supra,* 380 U.S. at 614, 85 S. Ct. at 1233.

The State makes no attempt to deny that Mr. Schantz' refusal to submit to a mental examination was made "costly" by the introduction of the refusal into evidence. The State instead contends that the refusal penalized him only on the issue of sanity rather than guilt. (Brief of Appellant at 22.) The argument, although having at first blush some appeal, is unsound. The framers of the Constitution did not intend for the protection of the fifth amendment to depend upon what kind of penalty a prosecutor could devise for a defendant invoking the privilege.

United States v. Kemp, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962), is directly on point. There the highest military court of appeals had the following facts before them:

A murder defendant refused to speak of the offense charged against him during an examination by a psychiatric board. As a result in its report the board stated that it was unable to determine whether the accused was capable of forming the intent necessary for the crime. Of course the report was never in evidence at the court-martial, but the prosecution called a member of that board to testify that the accused was not psychotic, that he could distinguish right from wrong and that he was capable of adhering to the right.

Then the defense, on cross-examination, brought out the fact that the witness had been a member of the board which was unable to form an opinion as to the accused's intent, thereby leaving the erroneous impression that since the time the board had examined the accused the prosecution's psychiatrist had reversed, or at least altered, his diagnosis.

On redirect the prosecution brought out testimony which explained the board's inability to reach a conclusion:

> "A. After the patient's rights were explained to him under the UCMJ, he choose [sic] not to speak about the offense itself at the Board Proceedings." 32 C.M.R. at 97.

In spite of the purpose of the testimony, the court held it to be violative of the defendant's rights against self-incrimination, quoting with approval Justice Black's concurring opinion in *Grunewald v. United States*, 353 U.S. 421, 77 S. Ct. 963, 1 L. Ed. 2d 931 (1957):

> "I can think of no special circumstance that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongrous and indefensible for courts . . . to draw inferences of *lack of honesty* from invocation of a privilege deemed worthy of enshrinement in the Constitution." 353 U.S. at 925-26, 77 S. Ct. at 984-85 (emphasis added).

This language is particularly apropos to the case at bar. The prosecution's admitted use of Mr. Schantz' refusal to be examined was to show that "this is not a good faith defense of insanity."

Fagundes v. United States, 340 F.2d 673 (1st Cir. 1965), also recognizes that any testimony which penalizes the defendant for exercising his privilege against self-incrimination is unconstitutional—regardless of whether it indicates guilt and regardless of whether it would be otherwise relevant to the questions at issue. In *Fagundes*, the defendant took the stand to assert his innocence and advance an alibi defense. On cross examination the prosecution brought forth the fact that upon his arrest he said nothing to the

police about an alibi and asked for a lawyer. This was done not to show evidence of guilt but was done to suggest that his assertion of an alibi was an afterthought. The First Circuit reversed, stating:

> "[W]e think it reversible error to permit a jury to draw *any* inference adverse to one accused of crime from his reliance upon his constitutional right to silence and to the advice of counsel. The right to silence on arrest is akin to the right to decline to take the witness stand in one's own defense." 340 F.2d at 677. (Emphasis added).

Cf., Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), *Ivey v. United States,* 344 F.2d 770 (5th Cir. 1965), *Helton v. United States,* 221 F.2d 338, 341-42 (5th Cir. 1955), and *United States v. LoBiondo,* 135 F.2d 130, 131 (2d Cir. 1943).

2. Refusal in the absence of a constitutional privilege.

While it is again respectfully submitted that the petitioner had a constitutional right not to submit to the examination, the existence of a constitutional right is not controlling. The State may not introduce evidence of a defendant's refusal to submit to examination, and the prosecutor may not comment thereon, whether or not there is a constitutional right to refuse.

Schmerber v. California, supra, held that a person had no constitutional right to refuse to submit to a blood-alcohol test. In a footnote the court recognized that this holding would raise the question of whether a person's refusal to take a test which he had no constitutional right to refuse would be admissible. The court stated:

> "If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to

> forego the advantage of any *testimonial* products of administering the test—products which would fall within the privilege . . . (Petitioner) argues that the introduction of . . . (evidence of his refusal to take a breathalyzer) and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under Griffin v. State of California, . . . (citation omitted). We think general Fifth Amendment principles, rather than the particular holding of *Griffin*, would be applicable in these circumstances, see Miranda v. Arizona, 384 U.S. at page 468, n. 37, 86 S. Ct. at 1624." *Schmerber v. California*, 384 U.S. at 765, n. 9, 86 S. Ct. at 1833, n. 9.

The court went on to hold that the petitioner waived this particular ground by failing to object to the prosecutor's questions and statements.

The note in *Miranda* which the Court cited states in part:

> "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Miranda v. Arizona, supra*, 384 U.S. at 468, n. 37, 86 S. Ct. at 1625, n. 37.

Thus the court has succinctly indicated that the privilege against self-incrimination applies to the introduction of a person's refusal to submit to state examination even though he has no constitutional right to refuse the particular examination in question. So long as he had a right to refuse, constitutional or not, his refusal cannot be entered in evidence against him.

The principle is illustrated by *City of Westerville v. Cunningham*, 12 Ohio App. 2d 34, 230 N.E.2d 671 (1967). There the prosecution introduced evidence that the defend-

ant, charged with driving while intoxicated, refused to submit to a blood-alcohol test. At that time in Ohio the defendant had no legal obligation to submit to such a test, just as Mr. Schantz in this case was under no legal obligation to submit to the psychiatric examination. The court held that *Griffin v. California, supra,* and *Malloy v. Hogan, supra,* prevented the prosecution's use of the refusal and that the introduction of the testimony constituted reversible error. The court based its opinion on the language in *Schmerber* set out above. The court went on to apply the "general fifth amendment principles" required in *Schmerber,* and found that the admission of evidence to show the refusal by the defendant to take the tests was a violation of his fifth amendment rights.

The same result was reached by the court in *Gay v. City of Orlando,* 202 So. 2d 896 (Fla. App. 1967), *cert. denied,* ..... U.S. ....., 88 St. Ct. 1052, ... L. Ed. 2d ..... (1968). The Florida court held that it was error to admit evidence of or to comment upon the defendant's refusal to take a breathalyzer test. The court noted that the defendant was under no obligation to take the test and that his refusal was a self-incriminating testimonial byproduct of the test ruled admissible by *Schmerber,* and held that the fifth amendment prevented its use in the defendant's prosecution.

The application of the rule is particularly appropriate in the instant case, a prosecution for murder. In all murder trials the jury is very alert for any evidence bearing on the possible intent of the defendant at the time the acts in question were committed. There is a great hazard that such a jury might believe the defendant's refusal to take a psychiatric examination resulted from a fear that the examination would disclose evidence of intent to support the state's charges. Because of this danger the admission

of evidence of Mr. Schantz' refusal violated his rights against self-incrimination. *Cf., United States v. LoBiondo, supra; Helton v. United States, supra; Ivey v. United States, supra,* and *State v. Dearman,* 198 Kans. 44, 422 P.2d 573 (1967) (all dealing with silence in the face of police questions). For judicial recognition of the possibility of a jury's inference of the accused's intent see, *United States v. Kemp, supra* (refusal based on constitutional grounds).

D. THE PROSECUTOR'S ARGUMENT.

The only evidence the State entered on the issue of petitioner's sanity was the testimony of Dr. Bindelglas that Mr. Schantz refused an examination. In closing argument the prosecutor stressed this evidence. (The entire comment is set out in the facts.) Briefly the comments were all variations on this one theme: "if this is a good faith defense, and this man has nothing to hide, why didn't he let our psychiatrist examine him?". *Malloy v. Hogan, supra,* held that the defendant is entitled "to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty, as held in *Twining,* for such silence." 378 U.S. at 8, 84 S. Ct. at 1493. *Griffin v. California, supra,* was a specific application of that rule. In *Griffin* the court held that a prosecutor's comments constituted a penalty for invoking the fifth amendment which is obnoxious to the Constitution.

As was more fully developed earlier in this brief, Mr. Schantz had a constitutional right to refuse to submit to examination by an unannounced state psychiatrist. Any comment by the prosecutor on the defendant's assertion of this right was unconstitutional. *Helton v. United States, supra; United States v. LoBiondo, supra; Miranda v. Ari-*

zona, supra; and *State v. Dearman, supra,* all squarely hold that it is reversible error for a prosecutor to comment on a defendant's refusal to talk to authorities investigating a crime.

Such comment is just another way to make the jury infer a lack of honesty on the part of the defendant from his refusal to talk to authorities seeking his conviction. Both *Fagundes v. United States, supra,* and *Grunewald v. United States, supra,* find this practice unconstitutional.

The cases cited by the State as allowing comment on an accused's failure to submit to various tests do not apply to Mr. Schantz' refusal to submit to a mental examination because the State had no authority to require him to acquiesce in such an examination. In each of the cases cited by the State, the courts indicated in dicta that they would allow comment as a form of punishment to coerce a defendant into taking tests which state law authorized its officers to require and which did not violate the defendant's privilege against self-incrimination. *State v. Carey,* 49 N.J. 343, 230 A.2d 384 (1967); *People v. Ellis, supra,* and *People v. Sudduth,* 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1966).* No court in this country has ever held that *Malloy v. Hogan, supra,* and *Griffin v. California, supra,* allow comment by the prosecutor on a defendant's refusal to cooperate with authorities when those authorities have no right to make him submit to their requests. In fact, *State v. Whitlow,* 45 N.J. 3, 210 A.2d 763 (1965), apparently holds that comment is prohibited even where the state has a right to force a defendant to submit to physical tests. In any case, wherever the line is to be drawn, the privilege extends to the petitioner.

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*California also requires a warning before comment is allowed even in that limited situation. *In re Spencer,* 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965).

> "Another possible penalty to the defendant for refusing to cooperate in a pre-trial mental examination would be to permit the judge or prosecutor to inform the jury at the trial of the defendant's refusal . . . . [A]nd as a result of the recent case of *Griffin v. California*, it is now clear that the defendant's proper assertion of the privilege may no longer be commented upon." Danforth, *Deathknell for Pre-trial Mental Examination? Privilege Against Self-incrimination*, *supra*, 19 Rutgers Law Review at 502-03.

See also *State v. Whitlow*, *supra*, 210 A.2d at 774. *State v. Olson*, 274 Minn. 225, 143 N.W.2d 69 (1966), and *United States v. Kemp*, *supra*.

V. The Introduction of the Bindelglas Testimony Violated Mr. Schantz' Right to Assistance of Counsel.

An accused is entitled to counsel whenever the presence of counsel is necessary to preserve his basic right to a fair trial. *Massiah v. United States*, 333 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); *Escobedo v. Illinois*, 378 U.S. 478, 84 St. Ct. 1758, 12 L. Ed. 2d 977 (1964); *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This rule was recently applied in *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). In that case the Supreme Court held that a criminal defendant has the right to counsel at a police lineup even though neither the lineup itself nor anything the defendant is required to do in the lineup violates his privilege against self-incrimination. The Supreme Court in *Wade* said:

> "[I]t is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the state at any stage of the prosecution, formal or informal in court or out, where counsel's absence might derogate from the accused's right to a fair trial. 388 U.S. at 226, 87 S. Ct. at 1932.

> "In sum the principle of Powell v. Alabama and succeeding cases require that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross examine the witnesses against him and to have effective assistance of counsel at the trial itself." 388 U.S. at 226, 87 S. Ct. at 1932.

Again, the question presented on this appeal is not whether there is a right to have an attorney present during a court appointed psychiatric examination, and for that reason the cases cited by the State holding that there is no right to an attorney during such an examination are not in point.*

The precise question at issue here is whether Mr. Schantz was entitled to assistance of counsel when he was confronted at his door by Dr. Bindelglas and *asked* to submit to a pyschiatric examination.

It is without dispute that, at the time Dr. Bindelglas made his request, Mr. Schantz had retained counsel known to the prosecuting attorney. The question, then, is whether at this "pretrial confrontation" Mr. Schantz was entitled to the presence of his retained counsel. Under *United States v. Wade, supra,* as well as *Massiah v. United States, supra,* and *Escobeda v. Illinois, supra,* the test to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial is whether counsel's presence at that time is necessary in order to adequately prepare for the trial and to meaningfully cross-examine the witnesses against the defendant, or whether it is necessary to preserve the defendant's right to a fair trial by advising

*We note parenthetically that under *Wade, supra,* the right to meaningfully cross-examine witnesses requires an attorney's presence at a psychiatric examination. *In re Spencer, supra.*

him of his rights. See also *People v. Sweeney*, 55 Misc. 2d 793, 286 N.Y.S.2d 506 (1968).

It is obvious from the State's opening brief that the confrontation between Mr. Schantz and Dr Bindelglas, occurring without notice and without advice concerning the possible legal ramifications thereof, presented a multitude of complex legal problems to be answered by Mr. Schantz on a moment's notice. He needed to know the possible consequences of his ultimate decision. For example, the State contends that his refusal is admissible against him. Admitting, only for the sake of argument, that this is true, the law requires that he be warned of such a penalty. *Miranda v. Arizona, supra; People v. Ellis*, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966). The State contends that any statements given to the examiner during the course of an examination could be used against him both upon the issues of guilt and of sanity. Again, admitting for the sake of argument that this is true, he should have known of this potential penalty. Several cases have indicated that a criminal defendant has the right to have his own psychiatrist present during a psychiatric examination. See *United States v. Albright*, *supra*, and *State v. Whitlow*, *supra*. This fact should have been known to Mr. Schantz before he decided whether to submit to an examination then, later, or not at all. Other cases have held that a criminal defendant has the right to have an attorney present during the psychiatric examination. See *In re Spencer*, *supra*, and *United States v. Albright*, *supra*. This fact would clearly have been of importance to Mr. Schantz in deciding whether and when to submit to examination. As noted earlier in this brief, many cases have held that a defendant's refusal to undergo various tests, whether or not he has a constitutional right to refuse, cannot be admitted into evidence nor argued by the prosecution. See *e.g.*, *Griffin v. California*,

supra, and *People v. Sweeney, supra.* Knowledge of this fact would be of great importance to a defendant in deciding whether or not to submit to psychiatric examination.

In short, then, Mr. Schantz was asked to make a decision with complicated legal consequences upon a moment's notice and without the necessary knowledge or advice. He could not be expected to know the ramifications of the request made by the State's psychiatrist. To admit into evidence his refusal, made in the absence of counsel, and under circumstances where the advice of counsel not only would have better prepared him to make the decision, but would have assisted counsel in preparing for trial, clearly violated his constitutional right to assistance of counsel guaranteed by the sixth amendment to the Constitution of the United States.

VI. The Trial Judge Should Have Held a Hearing Outside of the Presence of the Jury to Determine the Admissibility of Mr. Schantz' Refusal to Submit to Psychiatric Examination.

In *Jackson v. Denno,* 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), the Supreme Court reversed a conviction which had been based in part on a confession which the defendant claimed was given involuntarily. The court in that case held that "fundamental fairness" required that no confession by the defendant be admitted until a hearing was held out of the presence of the jury to determine whether that confession was given freely and voluntarily. The rationale behind that decision was that there are many reasons aside from the defendant's guilt which can cause him to confess, and that to enter the confession without first determining the reason behind its making violates the defendant's right to a fair trial.

The same reasoning applies here. There can be many reasons why Mr. Schantz refused to speak to Dr. Bindelglas. He did not know Dr. Bindelglas. Dr. Bindelglas surprised

him. He may have felt that his attorney would not want him to talk to anyone without the attorney's approval. He may simply have had something else to do that day. And he may very well have been frightened by the sudden appearance of a State official at his home without notice to him or his attorney.

The requirement for a hearing has been applied in a number of situations other than to determine the admissibility of a confession. See *e.g., People v. Smiley*, 54 Misc. 2d 826, 284 N.Y.S.2d 265 (1967) (admissibility of lineup identification), *People v. DuBois*, 31 Misc. 2d 157, 21 N.Y.S.2d 21 (1961), *cf., Banks v. Pepersack*, 244 F. Supp. 675 (D.C. Md. 1965) (admissibility of evidence obtained by search and seizure).

As noted earlier in this brief, the State has admitted that the Bindelglas testimony is weak evidence that the defense of insanity was made in bad faith. There are equally strong inferences flowing from the Bindelglas testimony which do not lead to that conclusion. As such, at a minimum, the trial judge should have held a hearing to determine the motives behind Mr. Schantz' refusal to be examined. His failure to do so constitutes fundamental error of constitutional proportions. *Roberts v. United States*, 384 U.S. 18, 88 S. Ct. 1, 19 L. Ed. 2d 18 (1967).

VII. The State Has Failed to Carry the Burden of Proof That the Admission of the Bindelglas Testimony and the Prosecutor's Comment Thereon Was Harmless Error.

In *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) the Supreme Court held that a judgment must be reversed if based upon constitutional error unless the prosecution can show beyond a reasonable doubt that the constitutional error was not prejudicial to the defendant. In this case the State has made no showing and has offered no evidence that the errors assigned herein were

harmless. On the contrary the State has indicated that the probative value of the evidence was weak, and yet seeks to justify extensive argument based upon that evidence which could have had no effect but to mislead and to prejudice the jury concerning the defense of insanity. The record is clear that there was no evidence produced by the State at the trial concerning Mr. Schantz' sanity other than the testimony of Dr. Bindelglas, while the appellee presented extensive medical evidence to establish his lack of sanity. Since the jury determined that Mr. Schantz was sane at the time of the alleged offense, it is patently obvious that the jury was persuaded to some extent by the Bindelglas testimony and the prosecutor's argument thereon. If the admission of that testimony or the prosecutor's argument was error, it was prejudicial error.

The State has cited *Wilson v. Anderson,* 379 F.2d 331 (9th Cir. 1967) as indicative of the spirit in which the harmless error rule is to be applied. That case was recently reversed by the United States Supreme Court, *Anderson v. Nelson,* ..... U.S. ....., 88 S. Ct. 1138, ... L. Ed. 2d ..... (1968), the Court holding that the prosecution had failed to carry its burden of proving beyond a reasonable doubt that constitutional error did not contribute to the defendant's conviction. See also *Fontaine v. California,* ..... U.S. ....., 88 S. Ct. 1229, ... L. Ed. 2d ..... (1968).

On the record before this Court it is impossible to find, beyond a reasonable doubt, that the evidence of Mr. Schantz' refusal to be examined and the prosecutor's comments on that evidence were not prejudicial, and did not contribute to Mr. Schantz' conviction. For that reason, should the Court determine that constitutional error was committed, either in the introduction of the testimony or in the prosecutor's comments thereon, that error requires that Mr. Schantz be awarded a new trial.

CONCLUSION

The issues presented on this appeal are much more narrow than argued in the State's opening brief. The Court need not decide whether a criminal defendant can be forced to submit to a psychiatric examination, whether he need answer every question put to him at that examination, whether the prosecution may use as evidence the defendant's answers to questions during the examination, or whether the defendant is entitled to assistance of counsel during such an examination. The issue here is whether the State may introduce evidence that a criminal defendant has refused to submit to an examination, and may comment upon that evidence, where there was neither notice given of the proposed examination, nor authority for the examination, nor notice to or assistance of counsel in determining whether the examination was to be held. It is respectfully submitted that, although a holding that this procedure violated any one of the defendant's constitutional rights must result in an affirmation of the District Court's opinion, the procedure in fact violated the petitioner's right not to incriminate himself under the fifth amendment, his right to assistance of counsel under the sixth amendment, and his right to a fair trial under the due process clause of the fourteenth amendment. As such, the petitioner should be given a new trial.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with the rules.

JOHN J. FLYNN